MAR 4 - 2002

No. 01-1118

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF PETA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization dedicated to exposing and ending animal abuse and suffering wherever it occurs through peaceful direct action and social advocacy. PETA enjoys the support of more than 750,000 members and supporters who represent this country's diverse population and include children, homemakers, scientists, teachers, member of religious groups of many different denominations, and elected representatives on both sides of the aisle. Consistent with this nation's greatest traditions of civil disobedience, PETA's nonviolent social advocacy in furtherance of its charitable animal protection mission often involves protests similar to certain

conduct of the petitioners in this case. The Seventh Circuit's opinion below threatens this exercise of PETA's First Amendment rights by holding that such protest activities violate the Hobbs Act and state extortion laws, and consequently the Racketeer Influenced Corrupt Organizations (RICO) statute under 18 U.S.C. §1961 *et seq*.

Therefore, we respectfully request this Court to accept the attached brief in support of the petition for certiorari in this case. Petitioners have consented to the filing of this brief, respondents have not consented.

Respectfully submitted,

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QUESTION PRESENTED

Whether the application of RICO to the petitioners' political protest activities violates the First Amendment where no true extortion was established, and no particular acts of extortion were specified in the jury verdict.

DISCLOSURE STATEMENT

I am a Professor of Law at Indiana University and a member of the bar of this Court. Following this Court's decision in *NOW v. Scheidler*, 510 U.S. 249 (1994), I published an article on the Court's decision, *NOW v. Scheidler, RICO Meets the First Amendment*, 1994 Supreme Court Review 129 (1995). The article agreed with the Court's holding that RICO could apply to a political action organization and went on to consider the problems facing the plaintiffs in the civil RICO suit that would then go forward. I concluded that the allegations made in the plaintiff's (respondent NOW's) complaint were inadequate to constitute a violation of RICO and raised serious First Amendment concerns. I had no connection to petitioners prior to publication of the article. Some time after this publication, I was retained by petitioners as a consultant to assist in their appeal to the Seventh Circuit, but I am no longer in their employ. I have been retained by PETA to prepare and file this brief.

Craig M. Bradley

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF PETA IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST [1]

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization that uses peaceful means to expose and end animal abuse wherever it occurs. When PETA hears allegations of abuse, it thoroughly investigates the

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

allegations and reports its findings to the proper authorities. PETA's actions closely resemble those of many social advocacy groups throughout the country's history, each of which has, in its time, incurred the wrath of those who wish no public scrutiny and no change in the status quo. PETA supporters also occasionally engage in non-violent civil disobedience to call public attention to laws or practices that they find objectionable consistent with the greatest protest traditions of this nation. In short, PETA engages in protest activity similar to that of petitioners. (An example of this is PETA's successful campaign to convince McDonald's, Burger King, and Wendy's fast-food restaurants to demand more humane animal care standards of their suppliers.)

Yet, the Seventh Circuit labeled the petitioners' non-violent civil disobedience as "extortionate threats" in violation of the Hobbs Act, 18 U.S.C. §1951, and as composing a "pattern of racketeering activity" in violation of RICO. In this regard, the Seventh Circuit's opinion is in direct contravention of the First Amendment as explicated by this Court in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

PETA's interest is not purely hypothetical. In 1997, PETA was sued under RICO for its investigation and exposure of animal cruelty at a New Jersey animal testing laboratory even though the United States Department of Agriculture fined the lab $50,000 for federal law violations found as a result of PETA's complaint. *Huntingdon Life Sciences, Inc. v. Rokke et al.* (E.D.VA 2:97CV597) (case settled). Other animal protection activists have been sued under RICO for peaceful protests and non-violent civil disobedience outside of a fur store. *Jacques Ferber, Inc. v. Bateman et al.* (E.D. PA 99 CIV 2277) (case settled). PETA will not stop speaking out for animal protection. It will continue to shine the bright light of public scrutiny into the dark corners where animals suffer and it will continue to vigorously challenge companies and consumers to change their attitudes toward the use and abuse of animals.

Therefore, the Seventh Circuit's opinion threatens PETA with the continued prospect of federal court injunctions, treble damage civil suits and even possible federal prosecution as it carries out its political protest activities.

PETA also has a long-standing interest in this case as an *amicus*. PETA was granted permission to serve this Court in that capacity in its initial consideration of this case in 1994, and PETA likewise served the Seventh Circuit, both in 1994 and 1999 following this Court's remand.

PETA expresses no view on the issue of abortion. Its interests in this case relate solely to the legal issues raised in this brief and in the petition for certiorari.

SUMMARY OF ARGUMENT

APPLICATION OF THE HOBBS ACT AND RICO TO THE ACTIONS OF THE PETITIONERS IN THIS CASE IS A CLEAR VIOLATION OF THE FIRST AMENDMENT.

Petitioners are members of an unpopular political advocacy movement. While their general anti-abortion position is shared by many Americans, the tactics they employ—blockading clinics, harassing patients and staff, etc.—are widely condemned. Nor are these petitioners necessarily innocent of all criminal activity. There is ample evidence in the record in this case suggesting violations of state trespassing, destruction of property, and perhaps other laws, and the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. §248 (a),[2] as well as (disputed) evidence of a few acts and threats of violence.[3]

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[2] Under FACE, 18 U.S.C. §248 (a),an individual may be subject to civil or criminal penalties if he

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to

However, as explained in my Supreme Court Review article,[4] violation of these statutes does not constitute a violation of RICO because neither FACE, trespassing, nor "acts or threats of violence" are among the listed "predicate crimes" necessary to constitute a RICO violation.[5] Indeed, the reason that the FACE statute was demanded by pro-choice advocates was because existing federal and state laws (including, presumably, RICO and extortion) were inadequate.[6] And, although respondent's complaint makes references to such crimes as murder, arson, and kidnapping committed by certain anti-abortion zealots, there was no proof of any such crimes having been committed by the petitioners in this case, and these claims were summarily dismissed.[7] Accordingly, the jury

injure, intimidate or interfere with any person because that person is or has been , or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services. . .

(3) intentionally damages or destroys the property of a facility or attempts to do so, because such facility provides reproductive health services.

[3] The jury found four (unspecified) "acts or threats of physical violence" against petitioners. Pet. App. p. 160a.

[4] Craig Bradley, *NOW v. Scheidler, RICO Meets the First Amendment,* 1994 Supreme Court Review 129 (1995). (Hereinafter referred to as *Bradley, First Amendment*).

[5] *See* 18 U.S.C. §1961 setting forth a lengthy list of RICO predicate crimes.

[6] Attorney General Reno testified that "existing Federal laws, while perhaps applicable in some instances, (are) inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong., 1st Sess., p. 8 (May 12, 1993). Likewise, Rep. Schumer, Chairman of the House Subcommittee considering the Bill opined that "(t)he state laws are inadequate to deal with the problem." Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103rd Cong., 1st Sess., p. 1 (April 1 and June 10, 1993).

[7] Judge Coar's Order of Sept. 23, 1997, p. 40.

verdict against petitioners was based entirely on over twenty violations of the Hobbs Act, under federal law, and a similar number of acts of "extortion" under state law.[8] However, just what acts or threats the jury might have been referring to in this verdict were never specified, and the trial judge refused petitioners' request to ask the jury to be specific.

Even more fundamentally, the judgment against these defendants under RICO, and especially the imposition of treble damages, violates the First Amendment, as this Court made clear in *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982). Reservations about subjecting such defendants to civil RICO were expressed by Justice Souter, concurring in *NOW v. Scheidler*, 510 U.S. 249, 263 (1994)(*NOW I*). He noted that "(c)onduct alleged to be Hobbs Act extortion may turn out to be fully protected First Amendment activity. . . . And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." *Id.* at 264. There follows a discussion of why a RICO suit is inappropriate in this case.

ARGUMENT

I. TREBLE DAMAGES AND COUNSEL FEES ARE INAPPROPRIATE AGAINST A POLITICAL ADVOCACY ORGANIZATION, AT LEAST UNDER THE FACTS OF THIS CASE

Claiborne holds that when political protest, which petitioners' conduct unquestionably is, is subjected to a damage suit, damages must be limited to the "direct consequences of (violent) conduct" and may not be "award(ed) . . . for the

[8] *See Pet.* App. 159a-160a (Special Interrogatories and Verdict form) (finding 25 violations of state extortion laws and 21 violations of federal extortion law). It is not specified whether any of these "extortion" crimes were related to the four "acts or threats of violence" also found by the jury.

consequences of nonviolent protected activity." 458 U.S. at p. 918. Thus, even if respondent established that its clients suffered financial injury in the amounts found in the jury verdict, it would have to establish that these were all due to those limited aspects of the petitioners' behavior that were violent. Even conduct that is illegal, such as trespassing and interfering with access to clinics through non-violent behavior, may not, under *Claiborne* be subject to damages. Nor, of course, may the legitimate aspects of petitioners' behavior. Treble damages and counsel fees under RICO, even if RICO is applicable, are clearly not allowed. RICO was designed to destroy the organizations to which it was applied, in part through the use of the treble damage remedy.[9] Such "destruction" is inappropriate as to a First Amendment protest organization. Damages limited to "direct consequence of violent conduct" do not include treble, or other punitive, damages, costs or counsel fees.

II. THE DAMAGES IN THIS CASE WERE NOT LIMITED TO "LOSSES PROXIMATELY CAUSED BY UNLAWFUL CONDUCT"

It seems clear, based on both the majority and concurring opinions in *NOW v. Scheidler*, as well as *Claiborne Hardware*, that a political advocacy group that engages in acts of violence may be subjected to both prosecution and civil suit under RICO, (but not treble damages). For example,

[9] "The arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as the property of organized crime remains, new leaders will step forward to take the place of those in jail." Hearings on Measures Relating to Organized Crime Before the Subcommittee on Criminal Laws and Procedures of the Sen. Comm. of the Judiciary, 91st Cong. 1st Sess. 449 (1969) (President's message on Organized Crime). See generally Craig Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L.R. 837 (1980), for an early, and relatively succinct, analysis of RICO's provisions.

as Justice Souter noted in *NOW I*, "we need not fear chilling" "ideological groups whose members commit acts of violence." 510 U.S. at 264. However, in *Claiborne Hardware*, which involved a mostly non-violent boycott of white merchants by the NAACP but which also involved some acts and threats of violence, the Court addressed itself to advocacy groups that may commits acts of violence:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence or threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . 458 U.S. at 916 . . . . Only those losses proximately caused by unlawful conduct may be recovered. *Id.* at 918.

Furthermore,

> The burden of demonstrating that (the taint of violence) which colored some acts, colored the entire effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. 458 U.S. at 933.

Yet, at this trial, as Judge Coar found in his opinion following the verdict, "the jury did not state which defendants did these acts or when they occurred, only the total number of acts." Pet. App. 126a. Indeed, he refused to require any specificity of proof despite the objection of the defense attorney that such specificity was necessary to adequately defend this case.[10] In order to hold members of an advocacy

[10] **Counsel for Defendants:**"Your honor . . . we urge that the plaintiff should list in the special interrogatories each particular incident they

group responsible for acts of violence the evidence must show which defendant did what at what time. It is not enough to show that there were violent acts committed by unidentified anti-abortion protestors, as cited by Judge Coar (Pet. App. 110a-113a), without tying them to particular acts of these defendants.[11] This violates the "precision of regulation" required by *Claiborne*, set forth above. Indeed, many of the acts cited by the respondent in its complaint were not committed by any of the petitioners or by people who were associated with their organizations.

III. NONE OF THE ACTS ALLEGED IN THE COMPLAINT CONSTITUTE VIOLATIONS OF THE HOBBS ACT, OR EXTORTION UNDER STATE LAW AND THE JURY VERDICT WAS INADEQUATE AS TO THESE CRIMES

The jury verdict is based on violations of the Hobbs Act[12] and "extortion under state law," both of which are "pattern

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allege to constitute an act of force, threat or violence sufficient to be extortion." **The Court**: "Absolutely not." Tr. Trans. p. 4495.

[11] Claiborne:

> The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another . . . '(B)lanket prohibition of association with a group having both legal and illegal aims' would present a 'real danger that legitimate political expression or association would be impaired.' . . . To punish association with such a group there must be 'clear proof that a defendant specifically intends to accomplish the aims of the organization by resorting to violence.'. . . This intent must be judged 'according to strictest law,' for otherwise there is a danger that one in sympathy with the legitimate aims of such a group, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes . . . . 458 U.S. at 918-19 (citations omitted.).

[12] The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

> (a) Whoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in

crimes" under RICO. However, as the Hobbs Act provides, and as is the case with most state extortion laws,[13] an element of that crime is *"obtaining property."* Yet in his instructions to the jury the judge specifically informed the jury that they could ignore this element: "(P)laintiffs must show that defendants . . . cause(d) . . . (various plaintiffs) to give up a property right."[14] *"It does not matter whether or not the extortion provided an economic benefit to PLAN."* [15] Thus, though the RICO concept of "enterprise" is not limited to those organizations that have an economic goal, as this Court held in *NOW I*, in this case, the crime of extortion *does* require, as the Hobbs Act states, that the defendant seek to "obtain property."

The crime of extortion, as exemplified by the Hobbs Act, is not committed by forcing someone to do something against their will. That is the crime of criminal coercion, which is not included among the pattern crimes of RICO. While the obtainment of *intangible* property can certainly satisfy the "obtaining property" element of the Hobbs Act,[16] it was an

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> commerce b[illegible]obbery or extortion or attempts or conspires so to do, or commit[illegible]hysical violence to any person or property in furtherance o[illegible] plan or purpose to do anything in violation of this section shall be fined, etc.
>
> * * *
>
> (b)(2) The term extortion *means the obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (emp. added).

[13] It was not specified by the jury which state's extortion laws had been violated by the defendants.

[14] Transcript at p. 4945.

[15] *Id.* (emphasis added).

[16] *See, e.g., Carpenter v. United States*, 484 U.S. 19 (1987) (holding that this will satisfy the implied element of property obtainment in the mail fraud statute, 18 U.S.C. §1341).

unjustified reading of that statute by the trial judge in this case to conclude that the element of "obtaining property" did not in fact require that the defendant actually obtain any property, but merely caused the plaintiff to forego a property right:

> The Hobbs Act was drawn from New York's Field Code. Under that code it was well-settled that extortion required an unlawful taking. As the New York cases cited by the Supreme Court in *United States v. Enmons* make clear, an accused could not be guilty of extortion unless he "was actuated by the purpose of obtaining a *financial benefit* for himself. . . .[17]

It is true, that in some states, "extortion" is not limited to "obtaining property" but may include "criminal coercion" as well.[18] However, since the jury did not specify which conduct constituted "extortion under state law," much less what state this conduct occurred in, we have no way of knowing whether the "extortions" found by the jury occurred in the few states that do not limit extortion to obtainment of property by the petitioners.

Furthermore, many of the "threats" issued by petitioners were threats of demonstrations or harassment, not of violence, and thus cannot be the basis of a charge of extortion against a political advocacy organization.

In *Richardson v. United States*, 526 U.S. 808 (1999) the Supreme Court considered the Continuing Criminal Enterprise statute (CCE) (21 U.S.C. §448). CCE is an "enterprise" statute similar to, and contemporaneous with RICO. It forbids

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[17] *Bradley, First Amendment*, supra n. 3 at p. 140, quoting *United States v. Enmons*, 410 U.S. 396, 406, n. 16 (1973).

[18] According to LaFave and Scott, *Substantive Criminal Law* (Vol. II p. 460, 1986) the only such states are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming, though some other states may simply call extortion "criminal coercion." *See Bradley, First Amendment*, supra n. 3 at fn. 82.

"any person" from "engaging in a continuing criminal enterprise." involving a "series of violations" of drug statutes. 21 U.S.C. §848(a) and (c). To find a violation of this statute, the Court held, "a jury . . . must unanimously agree, not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" 526 U.S. at 815.

Likewise, RICO requires proof of a "pattern of racketeering activities." Thus, applying *Richardson*, the jury verdict must specify precisely which of the many acts mentioned at the trial were the predicate acts of extortion that constituted the RICO pattern. But the charge to the jury required no such proof.[19] Indeed, as noted above, the judge, over defense objection, flatly refused to require such a finding by the jury. Nor did the jury verdict specify which of the various acts of extortion that they found constituted the "pattern."[20] This is particularly crucial under RICO because, without knowing what conduct constituted the "21 acts of extortion under federal law" and "25 acts under state law" found by the jury, it is impossible to tell whether these crimes constituted the necessary "pattern," whether the enterprise was conducted "through" those crimes or even which defendant committed, and which "enterprise" was conducted, through all these crimes.

When the acts in question are part of a political protest, this defect is even more acute, as *Claiborne Hardware* makes clear. The jury's finding of 21 acts of extortion under federal and 25 under state law must be specific. That is, the verdict must state which defendant committed which act of violence. The failure to be specific shows that the jury, like the complaint, did not carefully consider which acts were

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[19] Transcript at pp. 4943-48.

[20] Verdict Form p. 29.

committed by these petitioners and which acts may have been committed by other anti-abortion activists. Nor, it appears, did the jury separate acts and threats of violence, for which damages may be awarded, from acts or threats of barricading and political demonstration, for which damages are inappropriate. There simply are not 25 acts that are even arguably "acts or threats of violence," or 21 acts that are arguably Hobbs Act violations, proved in this case. Had such lawsuits been allowed to proceed in the 1960's, they would have shut down the civil rights movement.

CONCLUSION

In conclusion, respondent has made out violations of the FACE statute and state trespassing laws, and enforcement of these laws should be adequate to allow abortion clinics to operate effectively. It is not generally necessary to invoke the stringent provisions of RICO, which were designed to put criminal enterprises out of business, against anti-abortion protesters, animal rights protesters, or other political activists. In order to do so, plaintiffs would have to show that a particular anti-abortion, or other "enterprise," was operated through a "pattern of racketeering activities," in this case extortion. But respondent has failed to do this. It has not proved extortion in that specific acts of violence or threats of violence aimed at the obtainment of property were neither proved, nor specified by the jury. It has not attributed particular acts or threats of violence to particular petitioners, nor has it shown a "pattern" as required by RICO. Finally, applying RICO to this case, without attributing damages to specific acts or threats of violence by named petitioners, violates the First Amendment, as does the imposition of treble damages and counsel fees. In order for PETA to effectively engage in political protest to protect the rights of animals, we respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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